DOCKET NO.: NNH-CV17-6072389-S	:	SUPERIOR COURT
	:	
ELIYAHU MIRLIS	:	J. D. OF NEW HAVEN
	:	
v.	:	AT NEW HAVEN
	:	
YESHIVA OF NEW HAVEN, INC.	:	AUGUST 29, 2019
FKA THE GAN, INC. FKA THE GAN	:	
SCHOOL, TIKVAH HIGH SCHOOL AND	:	
YESHIVA OF NEW HAVEN, INC.	:	

MOTION TO PRECLUDE EXPERT TESTIMONY

Pursuant to Practice Book § 13-14 and the Court's inherent authority, the plaintiff, Eliyahu Mirlis ("Plaintiff"), by and through his undersigned counsel, hereby moves for an order precluding the defendant, Yeshiva of New Haven, Inc. fka The Gan, Inc. fka The Gan School, Tikvah High School and Yeshiva of New Haven, Inc.'s ("Defendant"), from calling expert witnesses at the hearing scheduled for October 21, 2019 (the "Hearing"), regarding the valuation of the property that is the subject of this foreclosure action. While Defendant disclosed three expert witnesses, an appraiser and two environmental professionals and provided their reports in accordance with this Court's order, it failed to produce any materials obtained, created, and relied upon by the experts in connection with their opinions on or before August 2, 2019, as ordered by the Court, and as of the date hereof have still not produced such documents. Because of Defendant's blatant disregard for this Court's discovery order, the Court should preclude Defendant from calling any expert witnesses at the Hearing.

I. FACTUAL BACKGROUND

The judgment that gave rise to this judgment lien foreclosure action arises was entered in the action captioned Eliyahu Mirlis v. Daniel Greer et al., No. 3:16-cv-00678 (MPS) (the "Underlying Action"), which was against, *inter alia*, Defendant and D. Greer by Plaintiff. Plaintiff alleged the

ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

Underlying Action, *inter alia*, that beginning in 2002, when Plaintiff was between the ages of fifteen and seventeen years old and a boarding student at the school operated by Defendant, D. Greer—who is both an attorney and a rabbi, and who is and the president of Defendant and a member of its board of directors—repeatedly and continuously sexually abused, exploited, and assaulted him. On June 6, 2017, the United States District Court for the District of Connecticut entered a judgment (the "Judgment") in favor of Plaintiff in the Underlying Action against Defendant and D. Greer in the amount of $21,749,041.10. The Judgment remains almost completely unsatisfied, with any minimal payments made having resulted from collection and foreclosure efforts of Mirlis. Plaintiff has been able to collect only $277,124.51 on account of the Judgment from Defendant and D. Greer.

Defendant owns the real property situated in the known as 765 Elm Street, New Haven, Connecticut (the "Property"). In this action, Plaintiff seeks to foreclose the judgment lien (the "Judgment Lien") encumbering the Property in order to collect some of the funds owed to him by Defendant.

Defendant filed a Motion to Substitute Bond (Doc. No. 106) on January 16, 2018, seeking to discharge the Judgment Lien in exchange for a bond, but never prosecuted that Motion. On June 5, 2019, Plaintiff filed a Motion for Judgment of Strict Foreclosure (the "Motion for Judgment") (Doc. No. 113) and the supporting appraisal report (the "Plaintiff's Appraisal") (Doc. No. 114). The Appraisal valued the Property at $960,000.00. In response, Defendant filed Defendant's (1) Objection to Motion for Judgment of Strict Foreclosure, (2) Motion to Discharge Judgment Lien and Substitute Bond, and (3) Motion to Continue Hearing on Motion for Judgment of Strict Foreclosure (the "Objection") (Doc. No. 115). In the Objection, Defendant, *inter alia*, seeks "to discharge the Judgment Lien with respect to the Property upon substitution of an acceptable bond or other security

in the amount of the fair market value of the Property." (Objection, p.4.) This is the same relief that Defendant sought a year and a half ago, but never prosecuted its motion.

Defendant sought to depose Plaintiff's appraisers, Patrick S. Craffey ("Craffey") and Patrick A. Lemp ("Lemp") of Valbridge Property Advisors prior to Defendant disclosing any expert reports or other information to Plaintiff. As a result, Plaintiff filed his Motion to Preclude Expert Testimony or in the Alternative for a Protective Order and to Modify Subpoenas (Doc. No. 120) (the "Motion to Preclude"), to which Defendant objected. A hearing was held regarding the Motion to Preclude and objection thereto on July 22, 2019. At the hearing, the Court ordered, *inter alia*:

> that with respect to all expert witnesses that the parties intend to call at the valuation hearing, that the parties should produce expert reports and any materials obtained, created, and relied upon by the expert in connection with their opinion, and we're just going to use the date that's suggested as August 2nd, 2019. So you're going to exchange expert reports as of August 2nd, 2019 in accordance with Practice Book 4 – 13-4b3.

Transcript of Hearing, July 22, 2019, 6:17-26 (attached hereto as **Exhibit A**). The Court further stated:

> THE COURT: Well, the – the disclosures – the disclosures –
> ATTY. CESARONI: Okay.
> THE COURT: - occur as to any expert witness to be offered. If you don't – if you don't make the disclosure and you don't make it on time, there's going to be a preclusion.

Id., 9:9-15.

Plaintiff timely filed a disclosure of Craffey as his expert appraiser on August 2, 2019 (Doc. No. 124), and he sent the Plaintiff's Appraisal and all materials obtained, created, and relied upon by Craffey in connection with his opinion via overnight courier, which arrived on August 2, 2019. Defendant timely disclosed his expert witnesses on August 2, 2019, as well (Doc. No. 123). However, Defendant failed to supply Plaintiff with any materials obtained, created, and relied upon by its experts on or before August 2, 2019, and in fact, Defendant has still not provided such documents.

II. LEGAL STANDARD

Practice Book § 13-4 concerns expert discovery. Specifically, Practice Book § 13-4(h) contains a provision for precluding experts from being called at trial. However, the Supreme Court interpreted former Practice Book § 13-4(4) as not precluding the Court "from imposing reasonable sanctions under either the broader, more general provisions of § 13-14, or under the court's inherent power, so long as that imposition is not inconsistent with the provisions of § 13-4(4). Although the provisions of § 13-4(4) are specific and detailed, there is no reason to think that, when the judges adopted them, they intended them to displace either the court's inherent power to impose sanctions, or the more general provisions of § 13-14, which also deals with violations of discovery orders." Millbrook Owners Ass'n v. Hamilton Standard, 257 Conn. 1, 12-13 (2001). Millbrook concerned a case in which a party failed to comply with the Court's order, rather than a violation of the timing for disclosure provided in Practice Book § 13-4, and thus, Practice Book § 13-14 and the Court's inherent authority provided the proper analysis for sanctions. Id. at 13-14 ("Thus, the underpinning of the conditional order of dismissal, and the subsequent October 26, 1998 judgment of dismissal, was not an untimely disclosure in violation of § 13-4 (4), but the broader ground of the plaintiff's purported failure to abide by Judge Teller's previous orders and the plaintiff's purported failure to meet the conditions of the court's September 14 order. This underpinning is most plausibly understood as rooted either in the provisions of § 13-14 or the court's inherent power.").

> In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. . . . Second, the record must establish that the order was in fact violated. . . . Third, the sanction imposed must be proportional to the violation.

Id. at 18-19.

III. LAW AND ARGUMENT

A. Defendant Should Be Precluded from Calling Expert Witnesses at the Hearing

The Court should use its inherent authority to preclude Defendant from calling any expert witnesses at the Hearing. Defendant moved to discharge the Judgment Lien in exchange for a bond in January 2018, but never sought to prosecute that motion or seek the relief sought therein until Plaintiff filed the Motion for Judgment and the Appraisal. Thereafter, the Court set deadlines for the exchange of expert disclosures and the materials relied upon by the experts of August 2, 2019, and warned the parties that the sanction for noncompliance would be the preclusion of an experts who were not timely disclosed along with the materials upon which they relied in forming their opinions. Plaintiff timely complied with the Court's Order by disclosing Craffey, his expert report, and the materials upon which he relied to Defendant. However, Defendant disregarded the Court's Order by failing to disclose the materials that its experts relied upon. Defendant's disobedience has prevented Plaintiff from appropriately analyzing the reports of Defendant's experts and has prejudiced his ability to prosecute this action. The rules of discovery were designed to prevent this type of "cat and mouse" game. See Pool v. Bell, 209 Conn. 536, 541-42 (1989). Moreover, Defendant's disregard of the Court's Order and the Court's statement that noncompliance would result in preclusion further warrant the Court precluding Defendant's experts from testifying at the Hearing.

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that the Court preclude Defendant from calling any expert witnesses at the Hearing and grant such other and further relief as justice requires.

THE PLAINTIFF
ELIYAHU MIRLIS

By: */s/ John L. Cesaroni*
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CERTIFICATE OF SERVICE

This is to certify that on August 29, 2019, a copy of the foregoing Motion to Preclude Expert Testimony was sent to all appearing parties and counsel of record as follows via electronic mail:

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John L. Cesaroni

EXHIBIT

A

NO: NNH CV 17 6072389 S	:	SUPERIOR COURT
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YESHIVA OF NEW HAVEN, INC. FKA THE GAN, INC FKA T	:	JULY 22, 2019

BEFORE THE HONORABLE JOHN LOUIS CORDANI, JUDGE

A P P E A R A N C E S :

Representing the Plaintiff:

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Recorded By:
Sheila Demetro

Transcribed By:
Sheila Demetro
Court Recording Monitor
235 Church Street
New Haven, CT

THE CLERK: The next matter, your Honor, is write-in number four, Mirlis versus Yeshiva of New Haven, Inc.

THE COURT: All right.

Good morning.

ATTY. SKLARZ: Good morning, your Honor.

For the defendant, Jeffrey Sklarz.

ATTY. CESARONI: Good morning, your Honor.

For the plaintiff, John Cesarani.

THE COURT: All right. So we're here on the plaintiff's motion for a protective order in this regard. And we're heading towards a hearing I think on August 23rd concerning the valuation of a property is what I'm remembering, and what I'm remembering from reading what I've read in your motion for a protective order.

I see that there's some dispute regarding the - the disclosures made or to be made by the defendant regarding potential witnesses and then the timing of the - the timing of discovery.

And so I've - I've read the documents. I'm happy to hear what you have to say.

ATTY. CESARONI: Yes, your Honor. I -

ATTY. SKLARZ: Just one - one moment.

THE COURT: Please.

ATTY. SKLARZ: I just want -

THE COURT: Yes.

ATTY. SKLARZ: - to make sure, your Honor. We filed an objection on Friday afternoon. I just want to make sure your Honor is aware of it.

THE COURT: So I see it here.

ATTY. SKLARZ: Okay.

THE COURT: I see it.

So, please, proceed.

ATTY. CESARONI: Well, your Honor, the - I don't think there can really be any dispute in this case that if we had moved forward with foreclosure and that the defendant hadn't requested to substitute a bond in favor of - of the lien to stop the foreclosure, that there's really no dispute that this would be a strict foreclosure. The Court wouldn't necessarily - would only - it doesn't actually have to find value. All it has to find is whether the property goes by strict or by sale and -

THE COURT: Well, I think I do have to find the value because that's - drives the redemption.

ATTY. CESARONI: Well, I mean, I think there's - there's no dispute that the value is substantially less -

THE COURT: Yes.

ATTY. CESARONI: - than a twenty-two million dollar debt.

THE COURT: That - that appears to be so.

ATTY. CESARONI: So - so the real - the real reason that we'd - we have an evidentiary hearing is to decide the sufficiency of whatever bond that the defendant is going to attempt to substitute, among - among other reasons.

THE COURT: Right.

ATTY. CESARONI: It's not just the value, but whether or not the property itself is a sufficient substitution. And, you know, we - we just don't think it's appropriate for our expert to be deposed before we've gotten any type of expert report or work papers from the defendant whose burden it is to establish the sufficiency of the substitution that it - that it wants to make.

THE COURT: All right.

ATTY. CESARONI: So all we're asking for is a - a fair disclosure of any reports of any experts and then to set an order for depositions.

My position is that we should be allowed to depose their experts first, as it's their burden, and then depose our experts second.

THE COURT: So as to the disclosure, I'm sort of understanding your point in that regard.

As to the timing, it seems that these things are sort of, well, what I'll characterize as relatively dry. It's your - your - your assessor is - or appraiser is appraising the value. It

doesn't seem like there should be that much that's - to be gained in that regard, but -

ATTY. CESARONI: No, I think that - I think that there are - from talking to Attorney Sklarz, I think that there's going to be a dispute about - I think there's going to be a significant dispute about the - the appraisals.

THE COURT: Fine.

ATTY. CESARONI: And he's already suggested -

THE COURT: But I'm saying -

ATTY. CESARONI: - the method -

THE COURT: - what can you get out of the deposition? You're going to just get the - how much he appraised it for and why.

ATTY. CESARONI: That's - that's right, your Honor.

Of course, we - if - since they have the burden, I think we should have the benefit -

THE COURT: All right. All right.

ATTY. CESARONI: - of deposing ours second.

THE COURT: I - I got it.

Anything further?

ATTY. CESARONI: No, your Honor.

THE COURT: All right.

ATTY. SKLARZ: The Practice Book requires there to be an appraisal and a finding of value for purposes of strict foreclosure.

THE COURT: And that's why we're heading for a hearing -

ATTY. SKLARZ: And that's what - and that's where we're headed.

THE COURT: - because you disagree. I got it. Yes.

ATTY. SKLARZ: So they've filed their appraisal. We've gone through it. We have a number of issues with it. We have our appraiser retained, ready - ready - who already prepared an appraisal over - over a year and a half ago when we thought we were going to be doing this a year and a half ago. That appraisal needs to be updated.

We'd like to take the deposition of the plaintiff's appraiser first because there's a number of issues to go over to understand the basis of valuation. Specifically, there were two recent sales of similar properties that we need to understand better why those properties were not included before our appraiser - our appraiser wants to understand that before he then renders his report.

At that point, if the plaintiff wants to then disclose another appraiser as a - as a rebuttal expert or make further disclosures, they have every opportunity, but it's their motion, it's

their motion for strict foreclosure. They've disclosed their appraiser. We're prepared to depose their appraiser and then disclose our report. So this - this is why it's sort of hard to reach - reach an agreement. They think we should go first. We think they have decided to go first so we should - we should be able to depose their appraiser and then - and then disclose.

THE COURT: All right.

ATTY. SKLARZ: It's really the order of disclosures and depositions.

THE COURT: All right. Given the impending hearing that's set for August 23rd and given what the Court considers to be a - should be a - a fairly straight forward matter of dueling experts regarding the value of the property, value of the property in question, the Court is going to order that with respect to all expert witnesses that the parties intend to call at the valuation hearing, that the parties should produce expert reports and any materials obtained, created, and relied upon by the expert in connection with their opinion, and we're just going to use the date that's suggested as August 2nd, 2019. So you're going to exchange expert reports as of August 2nd, 2019 in accordance with Practice Book 4 - 13-4b3.

As to the - as to the - the timing of the

depositions that go thereafter, that's not really of a too significant concern to me, but I think I'll decide - I'll - I'll allow the plaintiff's expert to be deposed first followed by the defendant's expert in this regard, but what's important to me is that the - that the identity of the experts be disclosed and that the reports and the - and the appropriate documents in connection with those reports be exchanged no later than August 2nd, 2019. And so that way you're both forewarned as to what's going to go on, and the deposition should be hopefully somewhat uneventful.

ATTY. SKLARZ: Just - just to clarify -

THE COURT: Yes.

ATTY. SKLARZ: - one point. May I - I've noticed depositions for the 26th and - and the 29th of July of - of plaintiff's expert. May I still go forward with those and then -

THE COURT: You shouldn't - the - depositions shouldn't go forward until you've disclosed what you need to disclose. And so -

ATTY. SKLARZ: Okay.

THE COURT: - the disclosure should occur first. If you wish - if you wish to go forward with those, just make your disclosure before - before the depositions if they can agree on the

dates, but what's important to me is that the disclosures occur first so that way the - everyone is on - on the same page, then the deposition should occur. So I have ordered that the disclosures occur no later than August 2nd, 2019. If you chose to make the disclosures sooner than that, that's fine with me. And if you can arrange for timing of depositions appropriately, that's also fine with me.

ATTY. CESARONI: I can work with Attorney Sklarz.

THE COURT: Yes.

ATTY. CESARONI: The only thing I would ask for is if we had at least a few days to review everything that was disclosed -

THE COURT: Of course.

ATTY. CESARONI: - but -

THE COURT: That makes good sense. I'm - I'm sure that you'll work it out now that - so I've ordered disclosures, contemporaneous disclosures of what you need to - what you need to do. Beyond that, I've allowed the plaintiff's deposition to occur first. Just work cooperatively and set it up.

ATTY. SKLARZ: Your Honor?

THE COURT: But the disclosure should occur first.

ATTY. SKLARZ: Okay. Thank - thank you, your Honor.

THE COURT: You're welcome.

ATTY. CESARONI: And, your Honor, just - just for the record, I think that there may be environmental - an environmental issue, but I'm not positive, from - from the defendant. That - that obviously would be included in all experts.

THE COURT: Well, the - the disclosures - the disclosures -

ATTY. CESARONI: Okay.

THE COURT: - occur as to any expert witness to be offered. If you don't - if you don't make the disclosure and you don't make it on time, there's going to be a preclusion.

ATTY. CESARONI: Okay.

THE COURT: So -

ATTY. SKLARZ: Thank you, your Honor.

ATTY. CESARONI: Thank you, your Honor. I just wanted to -

THE COURT: No. I - I understand that.

ATTY. CESARONI: - clarify that.

ATTY. SKLARZ: Thank you.

THE COURT: You're welcome.

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C E R T I F I C A T I O N

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of New Haven, New Haven, Connecticut, before the Honorable John Louis Cordani, Judge, on the 22nd day of July, 2019.

Dated this 8th day of August, 2019 in New Haven, Connecticut.

Sheila Demetro
Court Recording Monitor